Supreme Court, U. S.
FILED
AUG 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-80

HOWARD POLIN,
Petitioner,

v.

CONDUCTRON CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

VERYL L. RIDDLE
THOMAS C. WALSH
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Respondents

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Question Presented	1
Statement of the Case	1
Reasons Why the Writ Should Not Be Granted	4
I. The Issues on Which Petitioner Seeks a Trial Have Already Been Tried and Resolved Adversely to Him	4
II. Petitioner Is Seeking an Advisory Opinion	5
III. The Decision Below Was Correct and Does Not Conflict With Any Decision of This Court or Any Other Court	6
Conclusion	8

Authorities Cited

Ashe v. Swenson, 397 U.S. 436 (1970)	4
Ashcroft v. Mattis, 45 U.S.L.W. 3751 (1977)	5
Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975)	5
Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1972), cert. denied, 409 U.S. 874 (1972)	7
Lewis v. Bogin, 377 F.Supp. 331, 337 (S.D.N.Y. 1972)	7
Mills v. Electric Auto-Lite Company, 396 U.S. 375 (1970)	5, 7
Mills v. Electric Auto-Lite Company, 552 F.2d 1239 (7th Cir. 1977)	5

Santa Fe Industries v. Green, 51 L.Ed.2d 480 (1977) 6

Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974), cert. denied 421 U.S. 976 (1975) 5

Securities Exchange Act of 1934, § 10(b) 2

Securities Exchange Act of 1934, § 14(a) 2

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 446, n. 8 (1976) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-80

HOWARD POLIN,
Petitioner,

v.

CONDUCTRON CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Should this Court grant certiorari to examine petitioner's right to another trial, under a different label, of facts already decided against him, and where it has been finally determined that he was not injured and therefore had no loss?

STATEMENT OF THE CASE

This action, filed in 1969, originally embodied a broadside assault against respondents and challenged virtually every management decision made by them during a period of five years. After a lengthy trial, all of those claims were resolved adversely to plaintiff, and that determination was affirmed in a compre-

hensive and scholarly opinion by the Eighth Circuit authored by Senior District Judge Talbot Smith. Petitioner now seeks to present to this Court a narrow and somewhat esoteric issue in this case, which is set against a distinctive, though rather confusing, background.

In Counts IV and V of his complaint, petitioner challenged the 1971 merger of Conductron Corporation into a newly created subsidiary of respondent McDonnell Douglas Corporation. That merger occurred at a time when Conductron had cumulative losses of almost $30,000,000 and had a net asset deficiency in excess of $16,000,000. After exploring various alternatives in order to save Conductron from bankruptcy, respondents finally determined that the only feasible solution to Conductron's continuing financial problems was a merger. Accordingly, on May 7, 1971, a Consent Statement concerning the merger agreement was sent to all Conductron shareholders. It was not necessary to solicit proxies because McDonnell owned enough shares of Conductron (more than 80%) to insure approval of the merger even if all public shareholders objected. The merger was eventually consummated, with Conductron shareholders receiving McDonnell common stock valued at $6.43 for each Conductron share, which at the time had a *negative* book value of $6.22.

Counts IV and V of the complaint assailed the merger under § 10(b) and § 14(a) of the Securties Exchange Act of 1934 and also alleged that the merger was planned and consummated by respondents in violation of their fiduciary duties to petitioner under state law. The basis of all these interrelated claims was that the merger was unfair and the representations made in connection with it were false.

Prior to trial, respondents moved to dismiss the federal claims. In view of McDonnell's stock ownership, the pleadings affirmatively disclosed a lack of any possible causation between any alleged misstatements in the Consent Statement and the con-

summation of the merger. The district court granted that motion but, in another order issued contemporaneously, said (A42):

> "As to Counts IV and V, we have concluded that a claim for breach of fiduciary duties has been stated."

At trial, petitioner vigorously contended that the merger was unfair under state law, for the same reasons that he now says the Consent Statement was misleading. The trial court heard the evidence and concluded that the merger was effected for a valid business purpose and did not result from a breach of fiduciary duties; in particular, the court found that "the terms of the merger were fair and equitable" (A58). On appeal, petitioner again complained repeatedly about the terms of the merger and respondents' actions in connection therewith. The Court of Appeals in several instances discussed petitioner's challenges to the Consent Statement (A30, A31 and A33) and then ruled as follows (A39):

> "The much-argued merger, in our judgment, was for a justifiable business purpose, there was no precipitous action taken, and the terms thereof were neither unfair nor violative of any fiduciary duty."

The Court of Appeals also pointed out that the attack upon the Consent Statement was inextricably intertwined with the unfairness claim and required analysis of the same facts (A37):

> "Plaintiff also contends that the district court erred in finding the terms of the 1971 merger to be fair and equitable. Plaintiff's attack on the District Court's findings of fairness consists, in large measure, of the same charges of self-dealing which he argues constitutes a violation of §10(b) without regard to the legitimacy of the corporate purpose of the 1971 merger."

The Court of Appeals affirmed the findings (a) that respondents had not breached their fiduciary duties and (b) that the terms of the merger were fair and equitable to the public shareholders of Conductron.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Issues on Which Petitioner Seeks a Trial Have Already Been Tried and Resolved Adversely to Him.

The issues which petitioner seeks to bring before this Court are simply not presented in justiciable form by this case. In reality, petitioner is asking this Court to review the decision below in order to determine whether he should be permitted to affix a different label to his cause of action (under the Federal Securities laws) and to retry the same facts and issues which were decided against him by the district court and affirmed by the Court of Appeals. The various charges intermingled by petitioner in Counts IV and V of his complaint, when reduced to their essence, challenged the fairness of the 1971 merger to the Conductron public shareholders. The common law claims which have been tried focused on the allegations that respondents breached their fiduciary duty in misleading the petitioner and subjecting him to an unfair merger. The primary assault upon the Consent Statement in petitioner's pleadings was that it "falsely represented that the plan and agreement represented a fair exchange for the public shareholders of Conductron." The courts below resolved all these contentions against petitioner, and those determinations are now final. Petitioner now asks this Court to sanction relitigation of those same facts under a different label in spite of the fact that such a retrial would be barred by the doctrine of collateral estoppel. See *Ashe v. Swenson*, 397 U.S. 436 (1970).

Contrary to petitioner's intimations, the Court of Appeals did not hold that the policy of full disclosure was unimportant, nor did it retreat in any way from the teachings of this Court. It simply held, in accordance with sound judicial principles, that it would not undertake to analyze the accuracy of the Con-

sent Statement under federal law after it had already been determined under state law that the basic allegations underlying the challenge to the Consent Statement were unsupportable. The only precedent to be derived from the court's holding is that a defeated plaintiff will not be permitted to retry his lawsuit a second time under a different theory.

II. Petitioner Is Seeking an Advisory Opinion.

Petitioner is asking this Court to do what the Court of Appeals properly refused to do, *i.e.*, to undertake "an academic exercise" (A30, n. 55) for the purpose of deciding questions which could have no effect on the legal rights of the parties. Said another way, petitioner is asking this Court to grant certiorari for the purpose of issuing an advisory opinion.

Both lower courts have held that the challenged merger was fair and equitable and, therefore, that petitioner was not damaged by its effectuation. Petitioner does not challenge that ruling in this Court. It cannot be disputed that injury or "loss causation" is an essential element of a cause of action under the securities law. *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied* 421 U.S. 976 (1975); *Browning Debenture Holders' Committee v. DASA Corp.*, 524 F.2d 811 (2d Cir. 1975). Since petitioner would not be entitled to any relief even if he prevailed on the questions posed by his petition, he has not presented a viable, justiciable issue to this Court. See *Ashcroft v. Mattis*, 45 U.S.L.W. 3751 (1977).

In this connection, petitioner's reliance upon *Mills v. Electric Auto-Lite Company*, 396 U.S. 375 (1970), is infected by a conspicuous failure to report the most recent chapter in that saga. On April 7, 1977, the Seventh Circuit in *Mills v. Electric Auto-Lite Company*, 552 F.2d 1239 (7th Cir. 1977), held that the terms of the merger were fair and that plaintiffs could not recover. In formulating the issue, the court said, *l.c.* 1243:

> "Damages must be based on evidence that the Auto-Lite minority shareholders were not paid a fair price . . ."

And after analyzing the evidence, the court concluded, *l.c.* 1249:

> "We therefore hold that the terms of the merger were fair and that plaintiffs should recover no damages."

In the absence of a compensable injury, a retrial of the Consent Statement claim would be an empty ritual. Petitioner's attempt to skirt this fatal flaw by asking for rescission is unavailing. If he has not been injured, he cannot obtain any relief of any kind. Since the law of the case establishes that he has not been injured, he has no live issue to present to this Court.

III. The Decision Below Was Correct and Does Not Conflict With Any Decision of This Court or Any Other Court.

Petitioner's artificial attempts to create a conflict with this Court's decisions or with those of other Circuits cannot withstand analysis. There is no basis for any assertion that the decision below runs counter to *Santa Fe Industries v. Green*, 51 L.Ed.2d 480 (1977). *Santa Fe* was a pleadings case in which the Court of Appeals had held that the use of a Delaware short-form merger was in violation of Rule 10b-5 even though there was no misrepresentation or deception. Petitioner here urged in the Eighth Circuit that the Second Circuit's ruling in *Santa Fe* required a valid business purpose in order to justify the merger. The Eighth Circuit, out of an abundance of caution, scrutinized the Conductron merger and found a valid business purpose—that of saving Conductron from bankruptcy. Whether the Court of Appeals was required to make that analysis under this Court's ruling in *Santa Fe* is immaterial, for petitioner's position can in no way be enhanced by this Court's disposition of *Santa Fe*.

Petitioner also asserts that the decision below is contrary to *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir. 1972), *cert. denied*, 409 U.S. 874 (1972). Here, petitioner's claims have been resolved adversely to him in this very same lawsuit, and the terms of the merger have been found to be fair. In *Kohn*, certain facts which had been adjudicated in other litigation were held not to preclude findings relating to issues other than the fairness of the merger. It should also be noted that *Kohn's* concept of materiality is no longer valid, for in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 446, n. 8 (1976), this Court rejected the definition of materiality applied in *Kohn*.

Petitioner's challenge to the lower court's disposition of the materiality issue is also predicated upon a misreading of the *Mills* case and ignores the more recent holding in this Court in *TSC Industries, Inc. v. Northway, Inc., supra.* As noted, respondent McDonnell owned sufficient Conductron stock to permit it to effectuate the merger without the consent of any other shareholder. In accordance with Delaware law, the Consent Statement was sent for informational purposes only. In *Mills v. Electric Auto-Lite, supra*, at 385, this Court held that misstatements in proxy solicitation materials could be material only if the solicitation "was an *essential link* in the accomplishment of the transaction." This was further defined at page 386 of the Court's opinion as requiring the petitioners to establish their case "by showing that proxies *necessary to approval of the merger* were obtained by means of a materiality misleading solicitation . . ." (Emphasis added.)

The *Mills* opinion and common sense compel the conclusion that the *"essential link"* is tied to the requirement that the votes solicited be necessary to the approval of the transaction, and this reading was reaffirmed in *TSC Industries, Inc.* See also *Lewis v. Bogin*, 377 F.Supp. 331, 337 (S.D.N.Y. 1972). Hence, the federal claims here were properly dismissed for lack of causation.

CONCLUSION

For the reasons stated, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

VERYL L. RIDDLE

THOMAS C. WALSH
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Respondents

BRYAN, CAVE, McPHEETERS
& McROBERTS
Of Counsel

August, 1977